

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 14M-6
09890

In the Matter of	)	EB Docket No. 11-71
)	
MARITIME COMMUNICATIONS/LAND	)	File No. EB-09-IH-1751
MOBILE, LLC	)	FRN: 0013587779
)	
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
	)	Application File Nos.
Applicant for Modification of Various	)	0004030479, 0004144435,
Authorizations in the Wireless Radio Services	)	0004193028, 0004193328,
	)	0004354053, 0004309872,
Applicant with ENCANA OIL AND GAS (USA),	)	0004310060, 0004314903,
INC.; DUQUESNE LIGHT COMPANY, DCP	)	0004315013, 0004430505,
MIDSTREAM, LP; JACKSON COUNTY	)	0004417199, 0004419431,
RURAL MEMBERSHIP ELECTRIC	)	0004422320, 0004422329,
COOPERATIVE; PUGET SOUND ENERGY,	)	0004507921, 0004153701,
INC.; ENBRIDGE ENERGY COMPANY,	)	0004526264, and 0004604962
INC.; INTERSTATE POWER AND LIGHT)	
COMPANY; WISCONSIN POWER AND)	
LIGHT COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE-MID CONTINENT, LLC;)	
AND SOUTHERN; CALIFORNIA REGIONAL)	
RAIL AUTHORITY)	
)	
For Commission Consent to the Assignment of)	
Various Authorizations in the Wireless Radio)	
Service)	

ORDER

Issued: January 30, 2014

Released: January 30, 2014

On January 15, 2014, Warren Havens filed a Request under Section 1.301(b) ("Request").¹ This Request petitions the Presiding Judge to permit Mr. Havens to appeal a series of issues related to rulings made in *Order*, FCC 14M-1, released January 8, 2014. However, the Request does not specify any issues that he wishes the Presiding Judge to rule upon. Remarkably, it contains no argument at all. Instead, it expects the Presiding Judge to somehow

¹ This filing differs from Mr. Havens' December 27, 2013, which was styled the same, and which is still pending.

divine Mr. Havens' issues and arguments by looking to an appeal filed with the Commission under Section 1.301(a) of the Commission's rules.² It is established Commission policy that "requests requiring action by an administrative law judge shall not be combined in a pleading with requests for action by the Commission."³ This in itself is sufficient reason to deny Mr. Havens' Request. In the interest of completeness, however, the substantive merits of Mr. Havens' Request are examined below.

Havens' Appeal under Section 1.301(a)

To put this matter in context, Mr. Havens' appeal to the Commission requests review of *Order*, FCC 14M-1, in which the Presiding Judge ordered counsel to appear in a prehearing conference and answer questions related to the terms and scope of legal services they provide or provided to Mr. Havens.⁴ Mr. Havens believes that simply by holding a conference, the Presiding Judge is:

- (i) ... "effectively den[ying] or terminat[ing] the right [of Havens] to participate as a party to a hearing proceeding, § 1.301(a)(1), including by imposing "sanctions" and burdens not authorized by any source of law, including the Commission's rules and orders,
- (ii) requir[ing] testimony or the production of documents over objection based on a claim of privilege, § 1.301(a)(2), and
- (iii) [raising] new or novel question(s) of law or policy and that the Order (Orders in this case) is such that error would be likely to require remand and should the appeal be deferred and raised as an exception.⁵

Section 1.301(b)

[A]ppeals from interlocutory rulings of the presiding [judge] shall be filed only if allowed by the presiding [judge]. Any party desiring to file an appeal shall first file a request for permission to file appeal. . . . The request shall contain a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The presiding [judge] shall determine whether the showing is such as to justify an interlocutory appeal and, in accordance with his determination, will either allow or disallow the appeal or modify the ruling. If the presiding officer allows or disallows the appeal, his ruling is final⁶

Mr. Havens asserts that the Presiding Judge's *Order* raises new or novel issues of law. But he fails to identify what issue he believes to be new or novel, and he fails to demonstrate

² Mr. Havens' Interlocutory Appeal Under Section 1.301(a) (filed January 15, 2014).

³ 47 C.F.R. § 1.44(b).

⁴ *Order*, FCC 14M-1 (January 8, 2014).

⁵ Mr. Havens' Interlocutory Appeal Under Section 1.301(a) at 2 (punctuation modified for clarity).

⁶ 47 C.F.R. § 1.301(b).

how any issue is new or novel. If Mr. Havens intends to suggest that it is novel for a Presiding Judge to require counsel to attend a prehearing conference to answer pre-viewed questions limited to nature and scope of assistance of counsel provided to a party, he is in error.⁷

It must be noted that Mr. Havens has once benefitted from asserting *pro se* participation.⁸ He now seeks the same benefit again, *albeit* under a new fact pattern.⁹ However, it was disclosed earlier this month that legal counsel has assisted Mr. Havens since May 2013, including on August 14, 2013, a date on which the Presiding Judge made a finding, now discovered to be erroneous, that Mr. Havens did not have counsel.¹⁰ Under such circumstances, it has become necessary for the Presiding Judge to inquire as to the nature and scope of Mr. Havens' admitted assistance of counsel. In other words, before any benefit may be allowed again to Mr. Havens for his asserted *pro se* status, it is essential that the Presiding Judge examine Mr. Havens' relationships with counsel. There certainly is nothing new or novel in a judge asking for non-privileged foundational information from a *pro se* party and his "assisting" legal counsel in testing an argument that the *pro se* party has raised. If a nominally *pro se* party believes foundational information on the scope and nature of attorney representations are protected by attorney-client privilege, counsel assisting would be expected to correct the client's error. Accordingly, for all the above reasons, Mr. Havens' request for interlocutory appeal under Section 1.301(b) is denied.

Conclusion

In this proceeding, Mr. Havens has, at times, failed to develop his arguments in his immediate pleadings, but rather referred to arguments he has made in prior pleadings filed elsewhere for unrelated purposes. It is directed that Mr. Havens and/or his "assisting" counsel, will hereafter explicate in immediate pleadings every argument requested for the Presiding Judge's consideration. Otherwise, the Presiding Judge would have to navigate imposing, labyrinthine networks of references and cross-references, often leaving the fact-finder to speculate as to the contours of argument(s) that Mr. Havens, *pro se* and/or "assisted" by counsel, is attempting to make. Therefore, be advised, in the future the Presiding Judge will consider only those arguments that can be identified and understood from reading and reviewing a single

⁷ *U.S. v. Legal Services for New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001) ("Courts have consistently held that the general subject matters of clients' representations are not privileged Nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged."); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D.N.Y. 1979) (citing *Colton v. U.S.*, 306 F.2d 633 (2d Cir. 1962)) ("Inquiries into the 'general nature of the legal services performed' do not invade the area protected by the attorney-client privilege because they 'do not call for any confidential communication.'"); *U.S. v. Kovel*, 296 F.2d 918, 923-24 (2d Cir. 1961) (the nature of the advice and assistance sought forms "the very factual basis which . . . was needed to determine whether the privilege existed."); *Walker v. American Ice Co.*, 254 F. Supp. 736, 738-39 (D. D.C. 1966) ("[T]he rule as to privileged communications does not exclude evidence as to the instructions or authority given by the client to the attorney to be acted upon by the latter."); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) ("Generally disclosure of confidential communications or attorney work product to a third party . . . constitutes a waiver of privilege as to those items.")

⁸ See Memorandum Opinion and Order, FCC 13M-16.

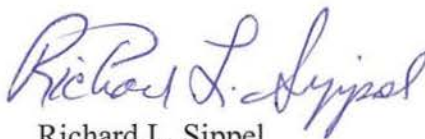
⁹ Havens' Opposition to Joint Motion of Enforcement Bureau & Maritime for Summary Decision on Issue G at 104-05.

¹⁰ Memorandum Opinion and Order, FCC 13M-16 at n.63.

pleading, without reference to other pleadings. For emphasis, be further advised that any argument that cannot be found within the four corners of a pleading will not be considered.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION¹¹



Richard L. Sippel
Chief Administrative Law Judge

¹¹ Courtesy copies of this *Order* are e-mailed on issuance to each counsel and Mr. Havens.